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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROBERT WARE,

Plaintiff and Appellant,

v.

PATRICIA JIMENEZ,

Defendant and Respondent.

B286822

(Los Angeles County
Super. Ct. No. BC646896)

APPEAL from a judgment of the Superior Court of Los Angeles County, Samantha P. Jessner, Judge. Affirmed.

Robert Ware, in pro. per., for Plaintiff and Appellant.

Schuler & Brown, Jack Schuler and Tina Javaherian for Defendant and Respondent.

Robert Ware alleged he was defamed in the workplace by Patricia Jimenez. The trial court sustained the demurrer to the First Amended Complaint without leave to amend, finding the statement at issue was an opinion. Ware appeals; we affirm.

FACTUAL AND PROCEDURAL HISTORY

Robert Ware, a public employee, filed the First Amended Complaint in this matter in July 2017, alleging that Patricia Jimenez, a manager in his workplace, defamed him in a meeting with Ware, Jimenez, and Ware's immediate supervisor. Ware asserted that the statement at issue: "you have poor work ethics," affected his employment and harmed his reputation. He alleged slander per se, and tortious interference with contractual relations.¹

Jimenez demurred, asserting a number of grounds.² Ware opposed the motion, arguing that the statement was an actionable statement of fact. In that opposition, Ware described the conversation that led to this action: Jimenez asked Ware whether he would leave his office with clients waiting. When he responded "yes," Jimenez stated, "you have poor work ethics."

Ware argued that, as a matter of law, the words Jimenez used were a false statement of fact. Acknowledging that

¹ Jimenez apparently filed a concurrent motion to strike, but the motion is not contained in the record.

² The only ground raised on appeal, and thus the only ground addressed in this opinion, is the argument that the statement was one of opinion, not fact, and was not actionable.

ordinarily communications in employee review or counseling sessions will not support a libel claim, Ware asserted that the statement at issue pertained to his private practice, not his public employment, and thus was neither properly the subject of the conference nor protected by the context.

The matter came before the trial court for hearing in September 2017. With respect to the claim at issue in this appeal, the trial court found that the statement, taken in context, was a non-actionable statement of opinion as a matter of law. The trial court entered the judgment of dismissal on September 25, 2017, and Ware appealed.

DISCUSSION

A. The Standard of Review

When a trial court sustains a demurrer, on review, the court must determine whether the complaint states facts sufficient to constitute a cause of action. (*Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1132 (*Sierra Palms*); *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100 (*Loeffler*).) The reviewing court must assume the truth of properly pleaded or implied factual allegations. (*Ibid.*; accord, *Boyd v. Freeman* (2017) 18 Cal.App.5th 847, 853.)

B. The Law of Defamation

“Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage. [Citation.] Thus, to state a defamation claim, the plaintiff must present evidence of a

statement of fact that is provably false.” (*Charney v. Standard General, L.P.* (2017) 10 Cal.App.5th 149, 157; see also *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1261 [defamation requires ““a provably false assertion of fact””].)

““The sine qua non of recovery for defamation ... is the existence of falsehood.’ [Citation.] Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [Citation.] [Citation.]” (*ZL Technologies, Inc. v. Does 1–7* (2017) 13 Cal.App.5th 603, 624; accord, *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259–260 (*Baker*) [“In this context courts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse”].)

The determination of whether a statement is one of fact or opinion is a question of law to be decided by the court. (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1312.) In making this determination, the court must consider the context in which the statement was made. (*ZL Technologies, Inc. v. Does 1–7, supra*, 13 Cal.App.5th at pp. 624–625 [“courts must also consider the context of the allegedly defamatory statements, “examin[ing] the nature and full content of the particular communication, as well as the knowledge and understanding of the audience targeted by the publication””]; *John Doe 2, supra*, at p. 1312 [““a court is to place itself in the situation of the hearer or reader””];

Summit Bank v. Rogers (2012) 206 Cal.App.4th 669, 696, [whether a statement is actionable fact or opinion must be decided by applying a “totality of the circumstances test pursuant to which we consider both the language of the statement itself and the context in which it is made.”].)

C. The Statements At Issue In this Case Are Statements of Opinion

A statement of opinion that implies a false assertion of fact is actionable. (*Wilbanks v. Work* (2004) 121 Cal.App.4th 883, 902-903 [assertions concerning ethics, while potentially viewed as statements of opinion, are nonetheless actionable if they imply “undisclosed defamatory facts as the basis for the opinion”].) Accordingly, we must determine “whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.” [Citations.]” (*Jackson v. Mayweather, supra*, 10 Cal.App.5th at p. 1261 [finding statement by the defendant that he ended his relationship with the plaintiff in part because of her abortion, and not his abusive behavior toward her, was “an assertion of fact capable of being proved true or false, not opinion”]; accord, *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1472 [finding opinion in letter that attorney “was ‘reprehensible,’ engaged in ‘unconscionable’ conduct, . . . and ‘egregiously violated’ his statutory duty as an attorney” were actionable as statements of fact given citations to specific code sections the attorney violated].)

Here, in contrast, the discussion leading to the alleged defamatory statement shows that Jimenez’s statement “you have poor work ethics” was not based on an implied provably false set

of facts, but instead on appellant's own words that established the factual predicate for the challenged statement.

“[W]hen a communication identifies nondefamatory facts underlying an opinion, or the recipient is otherwise aware of those facts, a negative statement of opinion is not defamatory. As explained in the Restatement Second of Torts, a “pure type of expression of opinion” occurs “when both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts and does not imply the existence of other facts in order to justify the comment. The assumption of the facts may come about because someone else has stated them or because they were assumed by both parties as a result of their notoriety or otherwise.” (Rest.2d Torts, § 566, com. b, p. 171.)” (*John Doe 2 v. Superior Court*, *supra*, 1 Cal.App.5th at p. 1314; see also *Charney v. Standard General, L.P.*, *supra*, 10 Cal.App.5th at p. 158 [statement that the plaintiff was investigated by an “independent” third party not defamatory because whether the investigation was independent did “not imply a provably false factual assertion”].)

The fact that the statement at issue implied a lack of ethical behavior is not determinative. Generalized statements of unethical behavior, like the statement here, have been held to be non-actionable statements of opinion. In *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, the court held a statement “impliedly assert[ing] [the plaintiff] had engaged in some unspecified immoral behavior . . . [was] incapable of being interpreted as implying a *provably false* assertion of *fact*.” “[A]n amorphous assertion of immoral behavior is within the range of

statements of opinion that are not actionable.” (*Id.* at p. 116-117.) (See also *Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 856 [statement that “[l]egal records show that [the plaintiff] is an unscrupulous lawyer who was sued for negligence, fraud and financial elder abuse” was non-actionable because whether the attorney was “unscrupulous” was not “provably false assertion of fact”]; *Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [statements asserting that a journalist had a conflict of interest were non-actionable: “The determination of a conflict of interest involves instead an application of an ethical standard to facts, reflecting the exercise of judgment. The judgment may, of course, be reasonable or unreasonable; but whatever quality may be attributed to it, the expressed belief in the existence of a conflict of interest does not imply an objective fact that can be proved to be true or false.”].)

Here, the facts on which the challenged statement was based were expressed, not implied, and were stated by Ware himself. Jimenez’s words constitute non-actionable opinion.

DISPOSITION

The judgment is affirmed. Respondent is to recover her costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.